No. 12265

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN H. AND COKE T. BRITE,

Appellants,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, ROBERT A. HEINZE, ET AL.,

Appellees.

BRIEF FOR APPELLEES

FRED N. HOWSER
Attorney General of the
State of California

DORIS H. MAIER
Deputy Attorney General of the
State of California

Attorneys for Appellees

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STATEMENT OF THE CASE

The appellants herein filed a petition for the issuance of the writ of habeas corpus in the United States District Court for the Northern District of California, Northern Division. The Honorable Dal M. Lemmon, judge of said court, on February 11, 1949, issued an order to show cause as provided by United States Code, Title 28, Section 2243, directing the respondent to show cause why the writ should not be issued. Thereafter, on February 17, 1949, respondent filed a return to the order to show cause and motion to dismiss. A traverse to the return was filed, and following oral argument by respondent on March 21, 1949,

the petitioners filed with the court a closing brief in answer to respondent's oral argument, and the matter was submitted.

The court, on May 4, 1949, rendered and filed its written order denying petitioner's petition for the issuance of the writ.

ARGUMENT

I. The Procedure Followed by the District Court in Denying the Petition Without a Hearing Was Proper Under the Statutes

The first three points enumerated by the appellants as grounds for reversal may be grouped together and constitute an attack upon the procedure followed by the District Court in denying the petition without first granting a hearing and producing the petitioners in court.

The appellants have relied mainly upon the case of *Walker* v. *Johnston,* 312 U. S. 275, in support of their contention that the District Court was bound under the law to issue the writ for the purpose of holding a hearing on the alleged issues of fact raised by the petition. The *Walker* case has been cited on numerous occasions in support of the proposition of law which was therein decided, to wit, that where a petition for a writ of habeas corpus raises an issue of fact, the court to which the petition is addressed must produce the petitioner personally for a hearing on such issue of fact and make a determination thereon.

In view of the numerous occasions upon which the *Walker* case has been cited with approval on this

point the appellee cannot take issue with the basic principle of law thus stated. However, such is not to say that the rule is applicable to the present case. To do so assumes the basic question in issue, namely, whether the petition states facts which, if true, would entitle the petitioners to their release. It was the duty of the District Court to determine preliminarily as a matter of law whether the petition and the return to the order to show cause raised such an issue of fact. In this connection, the decision in the *Walker* case specifically recognizes that in some instances the court to which the petition is addressed is empowered to make such preliminary determination without a hearing and to decline to issue the writ. This may be done immediately upon the filing of the petition or following a return to an order to show cause. The Supreme Court in thus deciding stated as follows:

> "It will be observed that if, upon the face of the petition, it appears that the party is not entitled to the writ, the court may refuse to issue it. Since the allegations of such petitions are often inconclusive, the practice has grown up of issuing an order to show cause, which the respondent may answer. By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of the writ with consequent production of the prisoner and of witnesses may be avoided where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. On the other hand, on

the facts admitted, it may appear that, as matter of law, the prisoner is entitled to the writ and to a discharge. This practice has long been followed by this court and by the lower courts. It is a convenient one, deprives the petitioner of no substantial right, if the petition and traverse are treated, as we think they should be, as together constituting the application for the writ, and the return to the rule as setting up the facts thought to warrant its denial, and if issues of fact emerging from the pleadings are tried as required by the statute."

In the later case of *Dorsey* v. *Gill,* 148 F. 2d 857, (cert. denied, 325 U. S. 890) the United States Court of Appeals for the District of Columbia, examined at great length the office and nature of a writ of habeas corpus and the procedure to be followed in federal courts upon an application therefor. The lengthy opinion is exhaustively annotated with a great number of cases including the *Walker* case. In summarizing the procedure which might be followed by a district court on a petition for the issuance of a writ of habeas corpus, that court stated as follows (pp. 865-866):

"There are at least ten such possible alternatives, as follows: (1) When a petition is presented to a judge with a request for leave to file it, the judge may, if the petitioner is not entitled to a writ, deny leave to file it; or (2) he may, in the interest of justice—if the petition is insufficient in substance—require petitioner to amend it; or he may require him to show—if the judge is not otherwise informed—whether petitioner has made a prior application and, if so, what action was had on it;

(3) he may issue a rule to show cause why leave to file a petition for writ of habeas corpus should not be granted and upon the return, may grant or deny leave to file; (4) after a petition has been filed, if it satisfies the requirements of the statute, the judge should issue the writ forthwith; (5) if, upon consideration of a petition which has been filed, it appears that the petitioner is not entitled to the writ, the court should refuse to issue it; (6) if the allegations of the petition are inconclusive, the judge may issue a rule to show cause why a writ should not be granted, to which the relator may respond; (7) if the procedure suggested in (6) is followed, the facts on which the opposing parties rely having been exhibited to the judge, he may find that no issue of fact or law is involved and may then refuse to grant the writ, in which event it is not necessary to hold a hearing; (8) on the other hand, if the procedure suggested in (6) is followed, the judge may find that the facts admitted —in response to the order to show cause—entitled the petitioner to the writ and to a discharge, forthwith, as a matter of law; or (9) he may find that an issue is involved; in which event he should grant the writ and require a hearing, the petition and traverse being then treated as, together, constituting the application for the writ, the return to the rule as setting up the facts thought to warrant its denial, and the issues of fact, thus emerging, should be tried as required by that statute; (10) if, as a matter of convenience, the judge—without determining whether the petition is sufficient—issues the writ, he may then, upon the return, hear and dispose of the whole matter at once."

The procedure suggested under number (7) was precisely the procedure which was followed by the Honorable Judge Dal M. Lemmon in the instant matter.

In commenting upon the abuse of the writ of habeas corpus and the necessity of the court to which a petition is addressed of determining preliminarily whether justice is to be served by the issuance of the writ, the court in *Dorsey* v. *Gill,* 148 F. 2d 857, stated at pp. 862-863:

> "Today, in the District of Columbia, we find a similar contrast. Here, petitions for the writ are used not only as they should be to protect unfortunate persons against miscarriage of justice, but also as a device for harrassing court, custodial and enforcement officers with a multiplicity of repetitious, meritless requests for relief. The most extreme example is that of a person who, between July 1939 and April 1944, presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions, a third 24, a fourth 22, a fifth 20. One hundred nineteen persons have presented 597 petitions—an average of 5. * * * The number has increased most rapidly during the last three years, since the Supreme Court's decision in Walker v. Johnston, and since one of the opinions filed in this Court in the Rosier case, admonished the District Court that: 'Administrative inconvenience, even occasional abuse of the facilities of the courts, is but a small price to pay for the previous right of access to the courts guaranteed under our system of government *to all who claim to be wronged.*' (Italics supplied.) Thus,

if all petitions presented during this period of three and one-third years had been filed and writs issued, as is the practice in some districts, the judges of the District Court would have been required to hold 815 hearings upon returns made, in each instance, by the custodial officers in whose control these persons were held."

It is clear, therefore, that so far as the procedure followed in the present case is concerned, the same was entirely in conformity with the rules laid down in the cases cited by appellants, and more particularly, in the later case of *Dorsey* v. *Gill,* 148 F. 2d 857, to which the attention of this court is especially directed for a full and complete discussion of the procedure on habeas corpus.

See, also:

Zahn v. *Hudspeth,* 102 F. (2d) 759 (cert. denied, 307 U. S. 642).

The sole question remaining, therefore, is as follows: Does the petition in the present case state facts which, if true, would entitle the petitioners to their release?

II. The Allegation In the Petition That No Proof of Premeditation Necessary to Sustain a Finding of Guilt to Murder In the First Degree was Offered by Respondent State, Was Insufficient As a Ground for the Issuance of a Writ

The opinion and order of the District Court (Record on Appeal, pp. 98 to 107), and the cases therein cited would seem to adequately dispose of this question. As pointed out by the Honorable Judge Dal

M. Lemmon in his opinion, the appellants appealed from the original judgment of conviction, which judgment was affirmed by the Supreme Court of California (*People* v. *Brite,* 9 Cal. 2d 666). That court specifically considered the question of the sufficiency of the evidence with respect to proof of the essential elements for first degree murder under the law of the State of California. After a complete review of the evidence and the circumstances surrounding the killing of the three men, the Supreme Court of California concluded that there was ample evidence to support the judgment in this respect (9 Cal. 2d 666, at p. 679).

It, therefore, follows without possible contradiction, that the state court did specifically consider and rule upon this contention of appellants that there was no evidence of premeditation or the other necessary elements of murder in the first degree. This point having been presented to and specifically passed upon by the state court, the federal court is bound by the rule that it will not reexamine such question and permit the writ of habeas corpus to serve as a second appeal on the merits.

Frank v. *Mangum,* 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969;
Mart v. *Lainson,* 169 F. 2d 1016.

In the recent case of *Telfian* v. *Sanford,* 161 F. 2d 556 (cert. denied, 332 U. S. 781; rehearing denied, 335 U. S. 864), the Circuit Court of Appeals in affirming a judgment dismissing a petition for writ of habeas

corpus, disposed of the matter in one very short paragraph, stating as follows:

> "A writ of habeas corpus cannot try the sufficiency of the evidence to support a judgment of conviction. The district judge was right in dismissing the application. His judgment is affirmed."

It is submitted that the contention of the appellants herein, insofar as it rests on the allegations of the petition that the evidence was insufficient to support a judgment of conviction of murder in the first degree, may be disposed of by this court in like manner.

III. There Was No Error In the Holding of the District Court That Petitioners Suffered No Injury From the Alleged Fact That the Prosecution Failed to Produce Evidence Which May Have Been Favorable to the Defendants

The evidence which the appellants claim was suppressed by the prosecution consisted of the speculative testimony of one B. F. Decker. An affidavit of Mr. Decker was attached to the petition (Petitioners' Exhibit No. 1, Record on Appeal, pp. 27-28). In such affidavit Mr. Decker states that he was interviewed in the district attorney's office prior to the trial; that he told the district attorney that he would not testify as was suggested to him, but would testify to the truth. Thereafter, he was not called as a witness.

It is readily apparent that the mere failure to call a particular witness does not amount to the suppression of evidence. The prosecution is not required to call all persons as witnesses who may have knowledge

of the prosecution in question. There is no showing in the affidavit that this particular witness was not available to testify for the defense or that the prosecution prevented him from so testifying. It is not even indicated that the defense was unaware of the fact that he had knowledge of the shootings.

The point thus raised is shown to be one which concerns a possible discovery of new evidence following the trial and in no way concerns appellants' right to due process of law.

It is well settled that to secure release on habeas corpus one must conclusively show that perjured testimony was willfully and knowingly used by the prosecution to secure a conviction.

Mooney v. *Holohan,* 294 U. S. 103;
Casebeer v. *Hudspeth,* 121 F. 2d 914;
Wagner v. *Hunter,* 161 F. 2d 601, (cert. denied, 332 U. S. 776).

The mere allegation that the prosecution failed to call as a witness one whose testimony was not favorable to the prosecution's case does not show a deliberate use of perjured testimony or even the suppression of testimony.

Kelly v. *Ragen,* 129 F. 2d 811.

IV. The District Court Correctly Ruled That the Petition Failed to State Facts Showing That the Trial Was Not Conducted Fairly, But Under the Influence of Mob Threatening

The District Court had before it in the instant case not only the petition proper, but also certain exhibits

filed therewith and in support of the petition. Viewing the petition as a whole, as including all of the exhibits attached thereto, the District Court was justified in concluding that from the whole thereof no sufficient showing was made indicating that the trial court lost jurisdiction due to mob hysteria and threatening during the course of the trial, and that petitioners were, therefore, deprived of their liberty without due process of law. In this connection, further language from the case of *Dorsey* v. *Gill,* 148 F. 2d 857, is particularly apropos. The court therein stated, as follows (p. 870):

> "It is apparent, therefore, that the words of the statute—*from the petition itself*—include information, available to the judge by judicial notice, to which the allegations of the petition refer, or upon which [sic] they depend; it is the duty of the judge to look through the petition, to the record, in order that he may discover such information; having done so, the exercise of sound judicial discretion may require that the petition be dismissed or leave to file it denied. In fact, this power and duty of the judge extends not only to the records of his own court, but to those of other courts as well."

The District Court in the present case took notice of the fact that the California Supreme Court in deciding this case on appeal from the original judgment reviewed evidence relative to the high state of feeling in the county during the time of the trial and concluded that "The trial was conducted with commend-

able fairness." *People* v. *Brite,* 9 Cal. 2d 666, at pp. 689-90.) The Supreme Court of the State of California, immediately following the trial of the case some 13 years ago, was, as stated by Judge Lemmon, in a better position to properly determine the possible effect of outside influences upon the course of the trial. This contention appearing in the petition and upon this appeal is subject also to the fatal criticism that the point has been fully considered by the state courts.

The meager allegations on this point and attempted support thereof in the exhibits attached to the petition bring into operation the oft stated rule that "the power conferred on a federal court to issue a writ of habeas corpus to inquire into the cause of the detention of any person asserting that he is being held in custody by the authority of a state court in violation of the Constitution, laws or treaties of the United States, is not unqualified, but is to be exerted in the exercise of a sound discretion. The due and orderly administration of justice in a state court is not to be thus interfered with save in rare cases where exceptional circumstances of peculiar urgency are shown to exist." (*Boyd* v. *O'Grady,* 121 F. 146, 147, and cases therein cited.)

It is submitted that the District Court properly exercised its discretion in concluding that this is not one of those "rare cases where exceptional circumstances of peculiar urgency are shown to exist."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court dismissing the writ should be affirmed.

Dated, Sacramento, California, September 6, 1949.

FRED N. HOWSER
Attorney General of the
State of California

DORIS H. MAIER
Deputy Attorney General of the
State of California

Attorneys for Appellees

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